83-57

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1983

DANA DAVIS,

Petitioner,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ALAN ELLIS, Member of the Bar
of the Supreme Court
and
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QUESTIONS PRESENTED FOR REVIEW

I. Were the defendant's rights under the Fourth Amendment to the United States Constitution violated when the state criminal court admitted evidence seized pursuant to a search performed as incidental to an arrest warrant lacking sufficient probable cause?

(Answered in the negative by the court below.)

II. Does the decision in Gates v. Illinois apply only to search warrants and not arrest warrants?

(Not addressed by the court below since Gates v. Illinois decided on June 8, 1983.)

III. Does the decision in Gates v. Illinois apply prospectively only?

(Not addressed by the court below. Same reason as # II.)

IV. Was petitioner's conviction procured in the face of a violation of his Sixth Amendment right to effective counsel and a fair trial and his Fifth Amendment right to due process all of which are applicable to the states through the Fourteenth Amendment to the United States Constitution?
(Answered in the negative by the court below.)

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JURISDICTION

Jurisdiction is conferred upon this court by virtue of 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

On May 14, 1980, the Honorable Fred P. Anthony, Judge of the Court of Common Pleas of Erie County, Pennsylvania, sentenced the petitioner to one (1) year in jail following his conviction by a jury for the possession of approximately 1/75th of an ounce of cocaine.

The relevant facts of the case viewed in a light most favorable to the prosecution and the procedural history are as follows:

On or about May 21, 1978, the petitioner, Dana V. Davis, was arrested pursuant to an arrest warrant issued by District Justice Charles R. Wise. It read in relevant part as follows:

> (A)t 5514 Grubb Road ... on or about 20 May 1978 between 3 p.m. and 3:30 p.m. (Dana Volkman) that he did sell a controlled substance to wit: marijuana quantity approximately one quarter pound

> (alleged for the sum of $60 to David Wayne Stephenson, a white male aged 16 years witnessed by Michael L. Swab. The defendant being the age of 23 years and the recipient being the age of 16." (Sic)

Petitioner was searched by the arresting officers incident to this arrest and a vial containing a minute amount of cocaine was found in the pocket of the pants he was wearing. Prior to trial, petitioner timely filed a pretrial motion to suppress physical evidence seized from him alleging inter alia that there was no probable cause for the arrest warrant and that, as such, the evidence should have been suppressed since it was procured pursuant to a search conducted as an incident to an unlawful arrest. On October 12, 1978, the Honorable Edward T. Carney, President Judge of Erie County, Pennsylvania, after hearing, denied petitioner's motion to suppress.

On February 15, 1979, petitioner proceeded to trial on both the delivery of marijuana charge and the possession of cocaine charge. The delivery of marijuana charge was the charge for which the arrest warrant had been issued. At no time was there a motion filed by counsel to sever these two cases for independent trial. Following the trial by jury before the Honorable Fred P. Anthony, petitioner was found not guilty of the delivery charge, but was found guilty of misdemeanor possession of cocaine.

At no time did trial counsel oppose consolidation of the possession charges nor did he move to sever these offenses despite the fact that they involved two separate occurrences.

A timely appeal was taken to the Superior Court of Pennsylvania and the petitioner's judgment of sentence was

affirmed without an official opinion on March 4, 1983. A timely petition for allowance of appeal to the Supreme Court of Pennsylvania was filed on behalf of the petitioner. Said petition for allowance of appeal was denied by the court on May 18, 1983. The petitioner now files the instant petition for writ of certiorari to the Supreme Court of Pennsylvania.

SUMMARY OF THE ARGUMENT

The arrest warrant issued for the petitioner was illegal since it lacked probable cause as a matter of law. The information contained therein was hearsay and insufficiently verified prior to the issuance of the arrest warrant by the District Justice. As such, the arrest was illegal, and the evidence procured by the search incidental to that arrest should have been suppressed.

The decision in Gates v. Illinois, infra, should now only apply to search warrants and not arrest warrants. While a search by government authorities is devastating, the initiation of criminal charges by an arrest warrant is even more severe. Consequently, relaxed standards of probable cause for search warrants should not be applied to arrest warrants.

Next, the holding in Gates v. Illinois, infra, should be applied prospectively only because it did not apply established law to a new factual pattern, nor apply to a case where the court had no jurisdiction to begin with. Rather, the Gates decision made a clear break with the past and overruled two highly important and much utilized Supreme Court cases in the area of search and seizure. Its holding should be prospective only.

Finally, petitioner's trial counsel was ineffective in that he permitted the petitioner's Sixth and Fifth Amendment rights under the United States Constitution to be violated when he failed to oppose the joining of two unrelated cases for one trial. The charge of sale of marijuana was related in no other way than by time to the charge of possession of 1/75th

of an ounce of cocaine. As such, significant prejudice inured to the petitioner and a new trial should be ordered.

ARGUMENT

I. THE DEFENDANT'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE STATE CRIMINAL COURT ADMITTED EVIDENCE SEIZED PURSUANT TO A SEARCH PERFORMED AS INCIDENTAL TO AN ARREST WARRANT LACKING SUFFICIENT PROBABLE CAUSE.

This Honorable Court has held that whenever an illegal arrest is made, the fruits thereof should be suppressed where the seizure of evidence has no other independent basis other than the illegal arrest. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In this case, Mr. Davis' arrest was illegal since based on an arrest warrant which did not meet the con-

stutitional standards of probable cause prior to its issuance by the District Justice in question.[1]

Under the tests devised by the Supreme Court in Aguilar v. Texas, 379 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1967), which were applicable to arrest warrants as well as search warrants in Pennsylvania, Commonwealth v. Milliken, 450 Pa. 310, 300 A.2d 78 (1973), and Spinelli v. United States, supra, the hearsay information contained in an affidavit had to be shown to be

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[1]In Pennsylvania's unified judicial system, a district justice is the first level judicial officer in the criminal system. Except for Philadelphia County, which has a municipal court system, district justices have criminal jurisdiction limited to summary offenses and selected third degree misdemeanors, and otherwise preside at preliminary hearings. 42 Pa. C.S.A. §1515. They also make the decision on whether to issue arrest and search warrants. Pa.R.Crim.P. 3(j), 119, 2001.

reliable as well as showing a basis of knowledge by the third party declarant as to how he knew what he claimed to have known.

This was clearly not shown as a matter of law in this affidavit. For instance, the affidavit does not say who told the affiant the information contained therein, let alone how anyone knew it was marijuana to begin with. Further, there is no indication of anything which the officer did to establish the accuracy of this hearsay information.[2]

Therefore, under appropriate law that more than a mere unsubstantiated tip is required for the establishment

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[2]The lower court took testimony on the suppression motion. It found as a fact, however, some factors which could support the arrest in the possession of the police, but that they had not been communicated to the district justice at the time the arrest warrant was issued. Lower Court Opinion, p. 2.

of probable cause to arrest, petitioner's arrest was illegal as based on a defective warrant. The evidence seized, the 1/75th of an ounce of cocaine, should have been suppressed.[3]

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[3]Even under the holding of Gates v. Illinois, infra, discussed infra, the standard is not met. There, the court stated that the task of the issuing magistrate is simply to make a practical common sense decision whether all the circumstances set forth in the affidavit before him including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. In reviewing this determination, the appellate courts must determine that there was a substantial basis for concluding that probable cause existed. Even under this standard, the above warrant is not valid. (Emphasis supplied).

II. THE DECISION IN GATES V. ILLINOIS APPLIES ONLY TO SEARCH WARRANTS AND NOT ARREST WARRANTS.

The decision in Gates v. Illinois, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 33 Cr.L. 3109 (1983), should apply to search warrants only. Because of the traditionally greater pressure, expense, anxiety, notoriety and litigation which flows from an arrest as compared to a search of a person, home or automobile, the standards for probable cause to issue a warrant for that arrest cannot, and should not be relaxed, along with the standards for probable cause for the issuance of search warrants as a whole enunciated by the court in Gates v. Illinois, supra.

This argument is logical since any search conducted even with a warrant will not necessarily subject the one searched to criminal charges unless something

is found which shows the police that they should be charged. In some cases the items seized are contraband per se, and provide a basis for charges by their very possession. Other items, such as weapons, or tax records, are not necessarily illegal to possess, but may be important evidence of a crime, and ultimately to the filing of criminal charges. Conversely, many searches will not ultimately turn up incriminating evidence nor result in the initiation of criminal charges.

One of the broader holdings of Gates v. Illinois, supra, is that where the question of whether to issue a search warrant arises, the district justice need only a substantial basis for concluding that there is a fair probability that contraband or evidence of a crime will be found in a particular place. As the court held, this standard is more consistent with earlier and tradi-

tional principles of probable cause for the issuance of search warrants.

However, this court cannot overlook the fact that a greater intrusion occurs, and a far greater burden is placed on a citizen of this country when he is subjected to arrest rather than just a search. For while a search of a home, person or automobile can be a devastating experience, see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the effects are still not as immediate or severe as when a person is actually arrested, and the criminal machinery of a state swings into full operation.

Thus, the standards for issuance of arrest warrants based on the statements of third parties must be greater than mere probability or a totality of the circumstances, and there should be a showing of how the officer's informant, named or not, obtained his information,

and why the police believed it or what of that information has been verified by independent police investigation.

In essence, petitioner advocates the application of the Aguilar-Spinelli tests to arrest warrants, and the standards enunciated in Gates v. Illinois to search warrants. To do otherwise, would subject all Americans to a far greater governmental power of arrest than our founding fathers could have ever intended in framing our Constitution and Bill of Rights.

III. THE DECISION IN GATES V. ILLINOIS SHOULD APPLY PROSPECTIVELY ONLY.

In United States v. Johnson, ___ U.S. ___, 103 S.Ct. 2579, ___ L.Ed.2d ___ (1982), the Supreme Court laid down guidelines for consideration of when a new ruling should be applied retroactively or prospectively. The court stated that questions of retroactive or prospective application only must be analyzed in conjunction with the type of case or decision for which retrospective application is sought. Thus, the court, to answer the question of retroactivity will apply a threshold test rather than the factors listed in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

In U.S. v. Johnson, supra, the court delineates three types of cases which must

be considered. The first type of case involves application of existing law to a new factual situation in order to arrive at a holding previously unannounced. Such a decision can best be described as a refinement in existing law. As such, full retroactive application is required by the decision in U.S. v. Johnson, supra.

The second type of case which the court discussed was the case which made a clear break with the past, and in doing so overruled long-standing precedent of the court. In this type of case, the court has indicated that prospective application is arguably the proper course.

The third type of case involves a situation where a lower court never had subject matter jurisdiction to begin with and thus, the appellate court's holding is completely retroactive and binding on

the parties involved.

The decision in Gates v. Illinois, supra, clearly broke with past precedent. The case overruled two prior decisions which, when read together, promulgated an entire standard for measuring probable cause affidavits for search warrants where the affidavit contains hearsay information from an unnamed source. Indeed, Aguilar and Spinelli, supra, are expressly cited in Johnson, supra, as examples of the first class of case; that of a refinement in the law utilizing established holdings and decisions.[4] Moreover, even under the requirements of Stovall v. Denno, supra, prospective application is mandated. Consideration of the Gates case in light of those factors illustrates that the new standards enunciated in Gates are designed

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[4]Gates v. Illinois certaintly does not fit into the third class of cases.

to serve a purpose; that of relaxing the requirements of probable cause before a district justice can issue a search warrant consistent with the requirements of the Fourth Amendment to the United States Constitution. Next, it cannot be denied that law enforcement authorities across the country placed considerable reliance on the old standards, and finally, it is illusion to suggest that the effects on the administration of justice of a retroactive application of the holding in Gates v. Illinois would be anything but utterly chaotic.

Although Mr. Davis' case was on appeal at the time of the decision in Gates v. Illinois, see U.S. v. Johnson, supra, footnote 8, he is entitled to make this argument since he could not have made it before and since to apply the decision in Gates v. Illinois

retrospectively would have the effect of denying him the protections afforded by the case law decisions interpreting the Fourth Amendment under a standard more restrictive than that currently in effect. This the court cannot do, especially in light of the decision in U.S. v. Johnson, supra. All things considered, the decision in Gates v. Illinois should be applied prospectively only.

IV. PETITIONER'S CONVICTION WAS PROCURED IN THE FACE OF A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AND A FAIR TRIAL AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS ALL OF WHICH ARE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Federal cases have held that the trial of two separate cases can be prejudicial to a defendant to the point where the right to a fair trial is compromised. U.S. v. Anderson, 642 F.2d 281 (9th Cir. 1981). In essence, the courts have held that the trial of two cases which are not so connected can severely compromise a defendant's Sixth Amendment rights to a fair trial. U.S. v. Bronco, 597 F.2d 1300 (9th Cir. 1979). It is also a violation of the due process clause to obtain a conviction in such a manner.

While the practice is governed by Fed.R.Crim.P. 8(a)[5], the appellate courts have been quick to reverse where a violation appears. U.S. v. Graci, 504 F.2d 411 (3rd Cir. 1974).

The instant case is unlike the case of U.S. v. Holman, 490 F.Supp. 755 (D.C. Pa. 1980) or U.S. v. Long, 674 F.2d 848 (11th Cir. 1982). In Holman, the defendants were charged with 12 separate counts of distribution of drugs. It was easy to see in that case that all 12 counts were interrelated, and constituted part of a common scheme or plan. And in U.S. v. Long, supra, the court held that it was not improper to jointly

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[5]Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

try the defendant on charges of drug smuggling as well as the accompanying violations of the Federal Aviation Statute.

But where, as here, the offenses alleged are totally separate, differing in date, offense, the type of drug involved, and based upon entirely different facts, the petitioner's attorney's failure to move to sever was ineffectiveness.[6] Said failure had the effect of violating Mr. Davis' right to a fair trial and his right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. It also means that his conviction was obtained without due process of law as required

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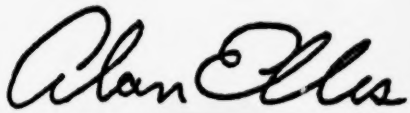
[6]See the recent case of Commonwealth v. Boykin, ___ Pa. ___, ___ A.2d ___ (1983) where the Pennsylvania Supreme Court held counsel ineffective for failure to file a motion to sever.

by the Fifth Amendment to the United States Constitution. On these grounds, certiorari should be granted and the petitioner should receive a new trial.

CONCLUSION

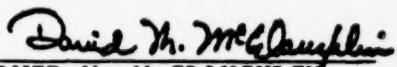
Wherefore, for all of the above-cited reasons and circumstances, the petition for writ of certiorari to the Supreme Court of Pennsylvania should be granted.

Respectfully submitted,



ALAN ELLIS

and



DAVID M. McGLAUGHLIN
Attorneys for petitioner

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	
v.	:	OF ERIE COUNTY, PENNSYLVANIA
	:	
DANA V. DAVIS	:	NO. 995 of 1978

O P I N I O N

Defendant has filed motions for a new trial and in arrest of judgment following his conviction of possessing cocaine on February 15, 1979.

The first issue raised is whether the suppression court erred in denying the defendant's motion to suppress a vial of cocaine as the product of an illegal arrest. The alleged illegal arrest was for a separate offense.

The defendant was arrested on May 21, 1978. An arrest warrant was issued that day which in part read as follows:

> *"(A)t 5514 Crubb Road . . . on or about 20 May 1978 Betw 3 p.m. & 3:30 p.m. (Dana Volkman) that he did sell a controlled substance to wit: marijuana qty. of approx. one quarter pound (alleged for the sum of $60.00, Sixty Dollars to David Wayne Stephenson, a white male aged 16 years witnessed by Michael L. Swab. The defendant being the age of 23 years and the recipient being the age of 16."* (sic).

The crime in which this warrant implicates and for which he was arrested on May 21, 1978, was a felony violation of Sections 13 and 14 of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act. 35 P.S. Sections 780-113(f) and 780-114 (Supp. 1979.) As such, Mr. Davis could have been arrested without a

warrant upon probable cause. Pa. R. Crim. P. 101(3).[1]

A lawful arrest must be based upon probable cause which in turn depends upon whether at the time of the arrest the arresting officer possessed such knowledge of particular facts and circumstances which would warrant a prudent man in believing that the suspect has committed or is committing an offense. *Adams v. Williams*, 407 U. S. 143, 925 Ct. 1921, 32 L. Ed. 2d 1612 (1972). See also *Commonwealth v. Flowers*, supra. *Commonwealth v. Badley*, 449 Pa. 19, 295 A. 2d 842 (1972).

A review of the suppression testimony establishes that in the course of investigating an unrelated burglary, one of the arresting officers on May 21, 1978 spoke with his own cousin who was implicated in the burglary. (Swab Testimony pp. 4, 11). In inquiring what happened with the money from the burglary the cousin, Michael Swab, indicated that it was used to purchase drugs. (Swab testimony, p. 7). Michael Swab further indicated to the arresting officer that he was present when David Stephenson purchased the drugs from Dana Davis. Ibid. That same day this officer went to David Stephenson's residence and questioned him about the burglary. (Swab Testimony, p. 5). Although not revealing from whom he

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[1] Because the arrest warrant herein was issued prior to July 1, 1979, its validity could be measured by whether the facts set forth therein as well as other facts presented to the issuing magistrate established probable cause. Pa. R. Crim. P. 119. However, the record of the suppression hearing fails to establish that facts beyond those set forth in the warrant were communicated to the magistrate. See *Commonwealth v. Flowers*, 245 Pa. Super. 198, 369 A. 2d 312 (1972). Thus, we will analyze this case by determining whether the arresting officer had probable cause to arrest without a warrant for a felony.

purchased the marijuana, Stephenson gave it to the officer. (Swab Testimony, pp. 7-9).

We believe this information warranted the arresting officer in concluding that the defendant sold Stephenson the marijuana and that Stephenson and Swab were reliable. Thus, probable cause for an arrest existed. *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Commonwealth v. Davis*, 466 Pa. 102, 351 A. 2d 642 (1976). Although informant Stephenson did not say he got the marijuana from the present defendant, he did admit its purchase. Indeed, he produced it for the officer. Such a declaration against penal interest established Stephenson's reliability. *Commonwealth v. Chumley*, 482 Pa. 626, 394 A. 2d 497 (1978). Moreover, Stephenson's production of the marijuana corroborates the information given by Michael Swab and establishes his reliability. See *Commonwealth v. Barrett*, 233 Pa. Super. 523, 335 A. 2d 476 (1975). Thus, we believe that at the time of the arrest the officers involved possessed sufficient trustworthy information from which they could conclude that the present defendant sold marijuana to David Stephenson and that Stephenson and Swab - the sources of this information - were reliable. The arrest being based upon probable cause was legal and, therefore, so was the seizure of the cocaine incident thereto.

Defendant contends that the trial judge erred in instructing the jury that a prior inconsistent statement could only be considered for impeachment purposes and could not be considered as substantive evidence. This argument is based on the decision

made by the Pennsylvania Superior Court in the case of *Commonwealth v. Loar*, 399 A. 2d 1110 (1979), which was decided May 16, 1979, and would thus have to be applied retroactively.

In *Commonwealth v. Ernst*, 476 Pa. 102, 381 A. 2d 1245 (1978), the Supreme Court, citing numerous decisions, stated:

> *"The almost uniform practice of this court has been to apply nonconstitutionally premised criminal law decisions in a non-retroactive manner."*

The *Loar* case dealt with an evidentiary change and not a constitutional right and thus does not require a retroactive application in the present case.

Defendant further asserts that his trial counsel was ineffective in failing to object to the court's instruction to the jury on prior inconsistent statements. There is no question that the law at the time was in accord with the court's instruction and there would have been no basis in law for the trial counsel to object.

Under such circumstances, it would be utter nonsense to find trial counsel ineffective.

O R D E R

AND NOW, to-wit, this 17th day of April, 1980, it is ORDERED and DECREED that defendant's Motion for a New Trial and Arrest of Judgment is denied.

Edward H. Carney, P.J.

Fred P. Anthony, J.

cc: District Attorney
Alan Ellis, Esq.

J. 772/81

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT
	:	OF PENNSYLVANIA
v.	:	
	:	No. 567 Pittsburgh, 1980
DANA V. DAVIS,	:	
Appellant.	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, Erie County, at No. 995 of 1978.

Before: CERCONE, P.J., CAVANAUGH, and JOHNSON, JJ.

MEMORANDUM OPINION:

Appellant, Dana V. Davis, takes this appeal from his conviction for possession of cocaine. Appellant raises several issues in his brief, however, we find none of them to have merit and we affirm.

The facts of this case are as follows. During the course of an investigation of a separate, unrelated burglary, Officer Allen P. Swab of the City of Erie police learned that appellant had sold a quantity of marijuana to David Wayne Stephenson, a juvenile. Based on this information, Officer Swab requested and obtained a warrant for appellant's arrest from District Magistrate Charles R. Wise.

Pursuant to this warrant, Officers Swab, Joseph Metz and other officers went to appellant's house and found appellant outside working on his car. Appellant was duly arrested and a

search of his person resulted in the seizure of a vial. Later analysis of the contents of this vial proved that it contained cocaine. Following a trial before a jury, appellant was acquitted of the charge of selling marijuana but convicted of the charge of possessing cocaine.

Appellant first argues that the lower court erred in denying appellant's motion to suppress physicial evidence, to wit: the vial containing cocaine, because it was uncovered as part of an illegal arrest. Appellant contends that the arrest warrant was not issued on probable cause because the Aguiler-Spinelli test was not satisfied because the police allegedly did not know the reliability of their informants.

The Aguilar-Spinelli test was established by the United States Supreme Court cases of the same names: Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969). The Aguilar-Spinelli test comes into play when the facts upon which probable cause is sought to be established come from an informer's tip, rather than from the police officer's personal knowledge or observation. There are two prongs in the Aguilar-Spinelli test. Firstly, in order to assure that the "tip" is not merely an unsupported rumor, the officer must know the underlying circumstances from which the informer concluded that the suspect possessed the

fruits or evidence of a crime. Secondly, in order to reduce the possibility that this "tip" is not just a well-constructed fabrication, the officer must have some reasonable basis for concluding that the source of the "tip" is reliable. Aguilar v. Texas, Id. at 114-115, 84 S.Ct. at 1514; Spinelli v. United States, Id. at 415-414, 89 S.Ct. at 588-590; Commonwealth v. Milliken, 450 Pa. 310, ___, 300 A.2d 78, 80 (1973). The Aguilar-Spinelli test is also used by the courts for judging probable cause for a search warrant. Commonwealth v. Milliken, supra, Id. at ___, 300 A.2d at 80. As was stated above, appellant contends that the police did not satisfy the requirements of Aguilar-Spinelli when they applied for the arrest warrant because allegedly the police did not know the reliability of the informants.

At the outset, it should be noted that the arrest warrant in the instant case was arrested on May 21, 1978, prior to the effective date of present Pa.R.Crim.Pro. 119, that is to say, prior to July 1, 1979. Rule 119 now requires that all proof of probable cause must be set forth within the four corners of the warrant. Since, however, appellant's case pre-dated Rule 119, this Court can consider the oral testimony offered by the police officers at the suppression hearing as evidence of the knowledge which they had at the time the warrant was sought. This is in keeping with Rule 119 which specifically limits its requirements

"to arrest warrants issued on or after July 1, 1979." Having set forth the scope of review, we turn now to the warrant itself.

In relevant part, the warrant provided:

> Information was related to this officer that a drug sale took place at the above location and time. This was transacted between a one David Wayne STEPHENSON, w, m, 1[illegible] and one Michael Leonard SWAB, w, m, 17, sale consisted of what was said to be 1/4 lb. This [sic] was made in lose [sic] form. Sale took place in hall way of the above residence and person buying the alleged marijuana was David Wayne STEPHENSON and the sale was witnessed by Michael Leonard SWAB, who saw the money and marijuana [sic] change hands.

While the warrant itself is vague as to the source of the "information...related to this officer," at the suppression hearing regarding the arrest warrant, the Officer who signed the warrant, Officer Allen P. Swab, testified that prior to obtaining the warrant, he was involved in the investigation of a separate burglary. One of the suspects of this burglary was David Wayne Stephenson, who told the officer that the money taken from the burglary was used to purchase drugs from a person he would not name. However, Stephenson did turn the marijuana over to Officer Swab. Officer Swab's further investigation led him to question his cousin, Michael Leonard Swab, another suspect in the burglary. It was Michael Swab who named appellant as the one who sold drugs to Stephenson and him. Officer Swab, however, gave no testimony at the suppression hearing indicating that he related any of this information to the magistrate. In this respect, the

instant case can be likened to Commonwealth v. Flowers, ___ Pa. Superior Ct. ___, ___, 349 A.2d 342, 347 (1975), wherein we wrote, "From [the suppression hearing] it appears that the trooper was able to supply the justice of the peace with sufficient information to support an independent judgment of probable cause; it does not, however, appear that in fact he did" (emphasis in original). For this reason, in Flowers we held, "It is not enough to say that the trooper might have given the answers for it is at least equally possible that he might not have. It follows that the Commonwealth did not meet its burden of proof; evidence consistent with two inconsistent propositions proves neither." Id. at ___, 349 A.2d at 348 (citations omitted). We therefore find that the Commonwealth failed to prove that it presented sufficient evidence to the magistrate to supply probable cause for the arrest warrant.

Our review does not, however, cease with this conclusion. In Commonwealth v. Whitson, 461 Pa. 101, 334 A.2d 653 (1975), the Supreme Court ruled that where the arrest was for a felony, the fact that the arrest warrant is defective because the magistrate was not presented with sufficient facts to establish probable cause was not grounds to reverse where the officer in charge who ordered the arrest had sufficient facts and circumstances within

his personal knowledge to justify a warrantless arrest. See also Commonwealth v. Wiggins, 239 Pa. Superior Ct. 254, 361 A.2d 750 (1974). This is in keeping with Pa.R.Crim.Pro. 101(3) which provides:

> Criminal proceedings in court cases shall be instituted by:
>
> . . .
>
> 3. an arrest without a warrant upon probable cause when the offense is a felony....

When Officer Swab went to arrest appellant, it was for the crime of selling one-quarter pound of marijuana, which is a felony under 35 P.S. §§ 780-113(f) and 780-114. Additionally, at the time of the arrest, Officer Swab made the arrest, he did so pursuant to information given to him by at least one accomplice to the alleged crime and one eye-witness. It is well settled that the uncorroborated confession of an accomplice or the information supplied by an eye-witness whose identity is known will supply probable cause for a warrantless arrest. Commonwealth v. Stokes, 480 Pa. 38, 7, 389 A.2d 74 (1978), and cases cited therein. We therefore hold that although the arrest warrant was arguably defective, the arrest was nonetheless valid because it was executed by an officer who himself had probable cause to arrest appellant. Commonwealth v. Whitson, supra, Commonwealth v. Wiggins, supra.[1]

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[1]Appellant argued that the lower court erred in instructing the jury that a prior inconsistent statement could only be considered for impeachment purposes and could not constitute substantive

Appellant next argues that trial counsel was ineffective in not opposing consolidation for trial of the separate criminal charges of possession of cocaine and of delivery of marijuana. The well-established test for determining effectiveness of counsel is whether the course chosen by counsel had some reasonable basis designed to effectuate his client's interests. Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). A finding of ineffectiveness is not called for unless the court concludes that the alternatives not chosen by counsel offered a substantially greater potential for success than the tactics actually used. Id. at 605 n. 8, 235 A.2d at 353 n. 8. See also Commonwealth v. Hubbard, ___ Pa. ___, ___, 372 A.2d 687, 695-696 (1977).

Keeping the above rule in mind, we turn to the test for proper consolidation of charges for trial, as set forth by this

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footnote 1 cont.

evidence. Appellant cites as authority for this position the case of Commonwealth v. Loar, ___ Pa. Superior Ct. ___, 399 A.2d 1110 (1979). This aspect of the Loar decision has been specifically repudiated by the Supreme Court in Commonwealth v. Waller, ___ Pa. ___, ___ n. 2, 444 A.2d 653, 654 n. 2 (1982), therefore appellant's argument has no merit.

Because of our disposition of the above issue, we also find no merit in appellant's further contention that trial counsel was ineffective for failing to take exception to the court's charge on prior inconsistent statements.

Court in Commonwealth v. Vickers, ___ Pa. Superior Ct. ___, ___, 394 A.2d 1022, ___ (1978), wherein we wrote:

> Consolidation or separation of indictments is a matter within the sound discretion of the trial judge, whose decision will be reversed only for a clear abuse of discretion or in cases of clear prejudice and injustice to an accused. Commonwealth v. Lasch, 464 Pa. 573, 347 A.2d 690 (1975); Commonwealth v. Loch, 239 Pa. Super. 331, 361 A.2d 758 (1976); Commonwealth v. Wheeler, 200 Pa. Super. 284, 189 A.2d 291 (1963). We have restated the test for a proper consolidation in Commonwealth v. Jones, 242 Pa. Super. 303, 363 A.2d 1281 (1976). In that case we indicated that consolidation will not be considered an abuse of discretion if the facts and elements of the charged offenses would be easily separable in the minds of a jury and if the fact of the commission of each crime would be admissible as evidence in a separate trial for the other. Commonwealth v. Jones, 242 Pa. Super. at 307, 363 A.2d 1281. See also Commonwealth v. Lasch, supra."[2]

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[2] In Commonwealth v. Morris, ___ Pa. ___, 425 A.2d 715 (1981), the Supreme Court discussed the problem of consolidation for trial of charges against a single defendant. Pursuant to the Court's decision in Morris, Pa.R.Crim.Pro. 1127 A(1)(a) was adopted. This Rule provides:

> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion....

Although Rule 1127 A(1)(a) did not take effect until July 1, 1982, well after appellant's trial, nonetheless the essence of the Rule is the same as the statement of the law on this point made by Commonwealth v. Vickers, supra.

Applying this rule to appellant's case, we conclude that the court did not abuse its discretion in consolidating the charges of selling marijuana and of possessing cocaine. First, the facts of the two crimes charged were relatively simple and could easily have been separated in the minds of the jury, and it appears by the verdict of acquittal on the marijuana charge that the jurors were able to separate the facts; second, the two charges were so intertwined that the evidence of each violation would have been admissible at a separate trial for the other. In Commonwealth v. Muffley, ___ Pa. ___, 425 A.2d 350 (1981), the Supreme Court was faced with a comparable fact situation. In Muffley the accused was arrested for possession of marijuana. While he was being booked at the station, the police found suspected LSD in the accused's pockets. The accused pleaded guilty to the marijuana charge and thereafter sought to have the LSD charge which was being prosecuted in separate proceedings, dismissed as violating the double jeopardy provisions of 18 Pa.C.S. § 110.[3] The Supreme

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[3]The relevant provisions of § 110 provide:

> Although a prosecution is for violation of a different provision of the statutes than the former prosecution ..., it is barred by such former prosecution under the following circumstances:
>
> (i) The former prosecution resulted in ... a conviction ... and the subsequent prosecution is for:
>
> * * * * * *

Court ruled that the two charges were part of the same criminal episode and that it was a violation of Section 110 to try the charges separately.

While we are not now faced with a Section 110 claim, indeed, since the two charges were tried in the same proceedings no Section 110 can be raised, nonetheless, the Court's conclusion in Muffley is relevant. As was just indicated, the Court in Muffley ruled, under facts quite similar to those in appellant's case, that the relevant charges were part of the same criminal episode. In Commonwealth v. Green, ___ Pa. ___, 413 A.2d 451 (1980), the Supreme Court ruled that absent any proof that consolidation was prejudicial or improper, the Court would affirm where the charges were interrelated and part of one criminal episode. For this reason, we conclude that the trial court did not err when it consolidated the charges for trial and that a motion for severance by defense counsel would have been baseless. Accordingly, we do not find counsel ineffective as appellant claims.

Lastly, appellant argues that trial counsel was ineffective because he failed to call witnesses at trial to testify that the

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footnote 3 cont.

(ii) Any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and was within the jurisdiction of a single court unless the court ordered a separate trial of the charge of such offense.

vial introduced at the preliminary hearing had a white cap, whereas the one introduced at trial had a black cap. This contention is meritless, for trial counsel called just such a witness to the stand, a Mrs. Janice Davis, and she testified that she was present at the preliminary hearing and that she observed that the vial introduced then by the Commonwealth had a white cap but that the vial introduced at trial had a black cap, and also that the vials were different shapes.

Finding no merit in any of appellant's arguments, we affirm.

Affirmed.

The Supreme Court of Pennsylvania
Western District

CARL RICE ESQ
PROTHONOTARY
IRMA T GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA
15219

May 26, 1983

Alan Ellis, Esquire
1420 Walnut Street, Suite 315
Philadelphia, PA 19102

IN RE: Commonwealth of Pennsylvania v. Dana V. Davis
No. 106 W.D. Allocatur Docket, 1983

Dear Mr. Ellis:

This is to advise you that your Petition for Allowance of Appeal in the above-captioned matter was denied by the Court on May 18, 1983.

Very truly yours,

Irma T. Gardner

DEPUTY PROTHONOTARY

ITG:kk
cc: Michael J. Veshecco, Esquire
Honorable Fred P. Anthony

P.S. Enclosed is your receipt for the filing fee.

APPENDIX C